was made for want of compliance with some statutory provision, or because of some statutory prohibition, might be validated by legislation afterwards: *Lews* v. *McElvain*, 16 Ohio 347; *Savings Bank* v. *Allen*, 28 Conn. 97; *Andrews* v. *Russell*, 7 Blackford 474; *Parmelee* v. *Lawrence*, 48 Ill. 331; *Dulancy's Lessee* v. *Tilghman*, 6 G. & J. 46; *Journeay* v. *Gibson*, 56 Penna. St. 57; *Carpenter* v. *Pennsylvania*, 17 How. 456; *Dentzell* v. *Waldie*, 30 Cal. 138; *Estate of Sticknoth*, 7 Nev. 223; *Gibson* v. *Hibbard*, 13 Mich. 215. But this case is not like those referred to. Here the statute has not undertaken to validate the void agreement, but has left it as it was, "utterly null and void." A suit cannot be brought upon it, because no contract ever existed. The repealing law, instead of indicating a purpose to validate such agreements, indicates the contrary purpose.

It only remains to consider a claim made by defendant to recover by way of set-off for moneys previously paid by him for liquors, and which, according to the law then in force, were paid without consideration. We have no doubt of his right to set-off these moneys if he proved the payment. This he claims to have shown by proving the payment by him of orders drawn by the plaintiffs in favor of third persons. We cannot see why this proof is not complete. Plaintiff relied upon *Buckley* v. *Saxe*, 10 Mich. 328. But that case was quite different. There, to prove that he had paid moneys on a bet, the plaintiff produced a note he had given for the sum bet; and this alone, it was held, did not prove the payment of money on the bet. Here the payment is proved, and as it was made on the drafts drawn by the plaintiffs on the defendant, it was in law a payment to the plaintiffs themselves.

The judgment must be reversed, with costs, and a new trial ordered.

Court of Appeals of Kentucky.

DAVIESS COUNTY COURT, APPELLANT, *v.* A. G. HOWARD ET. AL., APPELLEES.

A county, under legislative authority, having voted to subscribe $250,000 to the stock of a railroad company, and the legislation permitting bonds to be issued for the amount so subscribed, the county court issued bonds and sold them at a large discount, until enough were sold to pay the $250,000. *Held*, that the county board exceeded its powers in issuing bonds to a larger amount than the sum subscribed.

An authority to issue bonds to a specified amount, is not an authority to sell bonds to raise that amount.

The county court having thus exceeded its powers, cannot by any subsequent action affirm and validate its unauthorized proceedings. Express legislation would be necessary for that purpose.

On a bill filed by tax-payers to enjoin the levy of a tax to pay interest on the bonds issued in excess of $250,000, it appeared that the bonds were all sold to the railroad company in whose aid they were voted, and consequently with full knowledge on the part of its officers of all the facts. *Held*, that the relief prayed for should be granted, as the bonds in excess of the sum permitted were nullities in the hands of the company.

APPEAL from Daviess Circuit Court.

W. N. Sweeney and *James Wier & Son*, for the County Court.

George W. Jolly, for the taxpayers.

PRYOR, J.—This is an appeal in the name of the Daviess County Court against A. G. Howard and others, taxpayers of the county of Daviess.

The Owensboro and Russellville Railroad Company was chartered by an act of the legislature, passed in the year 1867. By the nineteenth section of the act of incorporation it was provided "that the county courts of Daviess, Ohio, Muhlenburg, and Logan counties shall have power, and are hereby authorized, to subscribe to the capital stock of the company in such number of shares as may be determined by said county courts respectively, and to levy upon the taxpayers of such counties respectively such taxes as may be necessary to pay the stock subscribed, and the said county courts may, if they shall deem it prudent, issue the bonds of said counties respectively for the amount of stock subscribed, or any part thereof, said bonds to be in such sums, and payable at such times, as said county courts may determine upon. That before such stock shall be subscribed by the county courts, the said county courts shall submit to the voters of said counties the proposition to subscribe stock and the amount thereof (to be suggested and fixed by the commissioners named herein), at an election to be held after due notice," &c.

The commissioners for Daviess county, in accordance with this provision of the charter, suggested to the county court a submission to the voters of the question, "Will the voters instruct the county court to subscribe 10,000 shares to the capital stock of the company?" The vote was regularly and properly taken, and a majority of the

voters favoring the subscription, the sum of $250,000 was subscribed and taken by the county as stock in the corporation, the shares being twenty-five dollars each.

At the July Term of the Daviess county court, held in the year 1868, it was ordered that George W. Triplett, the county judge, W. B. Tyler and E. C. Berry be and are hereby appointed a committee on behalf of the county court of Daviess county, "to have bonds executed and prepared of a sufficient amount to satisfy and pay off the subscription on the part of the county of Daviess to the Owensboro and Russellville Railroad Company. That said bonds be executed and made payable as follows, viz.: $50,000 five years from date, $50,000 ten years from date, $75,000 fifteen years from date, $75,000 twenty years from date, the bonds bearing interest at six per cent. per annum, payable semi-annually, for the payment of which coupons were attached," &c.

The committee, or a majority, were authorized by this order "to sell or dispose of the bonds, either to the Owensboro and Russellville Railroad Company, or to individuals, or to other corporations, on such terms as said committee may deem best and most advisable to the interests of the county of Daviess in paying the subscription," &c. At a subsequent term of the court, held in the same month, July 1863, it was recited "that as the court had ordered the committee to have bonds prepared and executed in a sufficient amount to satisfy and pay off the subscription, and to sell and dispose of said bonds either to individuals or corporations: It is now ordered, that said order be so amended as to authorize said committee to appoint agents to sell said bonds."

Under these orders of the county court the bonds of the county were executed, not only for the $250,000 and its interest, but for the additional sum of $67,350, making the whole amount of interest-bearing bonds, with coupons attached, $317,350.

These bonds, as is alleged in the petition, were sold to the railroad company in discharge of the county subscription, and many of them are now in the hands of parties unknown to the plaintiff in the action. A tax has been levied on the taxpayers of the county to pay the bonds as they matured, and the accruing interest on the whole amount.

The plaintiffs, the taxpayers of the county, instituted the present action in which they seek to enjoin the county court from collecting either the principal or interest upon the bonds issued in excess of

the $250,000, insisting that the county court, as the agent of the taxpayers, exceeded its authority in making sale of any of the bonds, and that the bonds other than those directed to be issued by the order of the county court made in July 1868, are void.

The county court or its committee acted upon the idea that it was invested with the power to execute and sell at a discount as many bonds as were necessary to raise the money to pay the subscription of $250,000. This is the sole question presented by the record. It is alleged in the petition that the railroad company, the Planters' Bank and others, are the holders of some of these bonds, and as they were made defendants to the action, and the court refused to pass upon the question as to the liability of the county to them, the appellees, the taxpayers have prayed a cross-appeal. This cross-appeal cannot be considered, as the parties against whom it is prayed, or who are to be affected by it, are not before the court. The court below has enjoined the county court from proceeding to collect the interest on the bonds in excess of the $250,000. These defendants, if they hold any such bonds, are not complaining, as they had failed to prosecute any appeal. The appeal is here by the Daviess county court against the taxpayer, that tribunal insisting upon its right to levy the tax to pay the interest on all the bonds issued and sold to satisfy the county subscription. The controversy is between the agent and the principal.

The county court by virtue of the nineteenth section of the act incorporating the railroad company, was invested with the power to pay the county subscription by levying a tax upon the property of the citizen, or by issuing county bonds in whole or in part discharge of the indebtedness.

The power to issue bonds was limited in amount to the sum subscribed by the county to the capital stock, and the county court, looking to the extent of the power with which it was clothed by the act in question, designated the number and amount of bonds to be issued by an order of that court made in July 1868. This order directed the execution of bonds for $50,000, payable in five years, a like amount payable in ten years, $75,000 payable in fifteen years, and a like sum payable in twenty years, with interest coupons attached, payable semi-annually. This covered the entire subscription, and when issued, it was proper for the county court to deliver them over to the railroad company in payment of the subscription made by the county. These were all interest-bearing bonds, and when exe-

cuted by the county for the amount of stock subscribed, the county court acted within the scope of the authority conferred by the act, and exhausted all the power that tribunal had to discharge the indebtedness in that manner. The act expressly authorized the county court to issue bonds for the amount of stock subscribed, but we find no power conferred by the charter upon the county court to issue bonds for $320,000. It was a cash subscription, and the interest-bearing bonds are to be regarded as equivalent to a cash payment, and, if the railroad company declined to accept them, in discharge of the subscription, it was the duty of the county court to raise the money by taxation.

That tribunal had no right either by reason of its jurisdiction over the subject-matter or by the letter or spirit of section 19 of the railroad charter, to issue bonds for an unlimited amount, and then place them upon the market at a discount in order to satisfy the debt to the railroad company. The power to issue the bonds does not imply the power to sell.

No general power is conferred upon county courts to issue such bonds or to subscribe stock in behalf of the county in which the tribunal exists to railroad companies or other corporations, and when this extraordinary power is conferred by legislative enactment by which a bare majority of the votes cast may impose upon a large minority of the citizens or taxpayers, a taxation by which they are to be burdened for years, courts should not be inclined to disregard, although it may be done by a liberal construction, the conditions and restrictions placed by the legislature upon such an exercise of power. The powers conferred by such legislation should be strictly pursued, and the fact that the county has incurred the liability cannot be held to justify any action the county court may see proper to take in order to secure its payment. In this case the voter agreed to be taxed in the sum of $250,000, the debt to be discharged by a direct tax, or by the issuing of bonds for that amount bearing interest. He has agreed to pay that sum, and to say that because he voted to pay that amount he is liable to pay the additional sum of $70,000 is not warranted by the letter or spirit of the law conferring the power on the county court to tax him or in consonance with natural justice.

If the legislature had been asked to vest in the county court of Daviess the power to raise by taxation the sum of $320,000, the whole sum bearing interest, to pay this debt of $250,000, would

such a proposition have received serious consideration; or if such authority had been expressly given, is it to be presumed that the taxpayer would have been so regardless of his own interest as to cast his vote in favor of the measure? It was never contemplated that these bonds should be sold at a discount, either by the county court or by the railroad company, so as to make the county responsible for the deficit. The power to sell the bonds to raise the money to pay for the stock was not given by the act. The bonds bearing interest were worth as much as the stock subscribed, and so regarded, no doubt, by the legislature when enacting the law. The county court, in fact, never authorized the issuing of bonds for a greater amount than $250,000, and if that tribunal had the right to exceed power conferred upon it, still it has not attempted to exercise this right except by a levy of the tax upon the citizen to pay the interest. It is maintained by the county court that, because it has once levied the tax, or continued to do so since the bonds were issued to pay the interest, this amounts to a ratification of the action of the county court by the taxpayers of the county. That the county court obtained all the power that could be properly exercised with reference to this question of taxation from the 19th section of the act incorporating the railroad company, is too plain for controversy. The county court, in issuing the bonds in excess of the $250,000, or permitting it to be done by the committee appointed by the court, transcended the authority given by the legislature, and no subsequent act of the county court, or of the taxpayer, can make valid the exercise of a power that had no legal sanction.

The corporation knew the extent of the power given the county court by the act incorporating the company. It received the bonds and is not complaining of the action of the court below. The action of the county court in collecting the tax upon the over-issue of of bonds, or the interest, was clearly illegal. They were nullities in the hands of the county court or the corporation, and the payment by the unwilling taxpayer cannot justify this unwarranted exercise of power. The voters of the county had no right to assume the burden except in the manner provided by the act. They could not ratify an act that neither the county court nor themselves had the power to perform. If the principal could not exercise the right it is difficult to perceive how his sanctioning its exercise by an agent could make it legal.

In making the over-issue the county court, or its committee, acted beyond the scope of its agency, and outside of the power given by the legislature. The only way in which the people could ratify it would be by a vote under a legislative enactment.

It is argued by counsel for the appellant (the county court) that there is no reason to discriminate between the holders of these bonds on account of the date of the purchase, and that there is no means of determining which of them are valid and which are not. This question cannot well arise between the county court and the tax-payer, and as there has been an excessive issue, the county court cannot complain of the injunction. It does not appear who has possession of the bonds. It is alleged that they were delivered or sold to the corporation, the railroad company. It was made a party defendant, and does not ask to have any equitable distribution of the fund, or to disclose even to whom it has transferred these bonds. The judgment below enjoining the county court from proceeding to collect the over-issue of bonds or the interest, by levying a tax upon the property of the appellees, is affirmed, and the cross-appeal of the appellees dismissed without prejudice.

RECENT ENGLISH DECISIONS (CONDENSED).

Court of Appeal in Chancery.

EAGLESFIELD *v.* MARQUIS OF LONDONDERRY.

The L. Railway Company was authorized by its acts of incorporation to issue 190,000*l.* preference shares and a large amount of ordinary shares. In 1864 it was amalgamated by Act of Parliament with the Cambrian Company, up to which time it had issued 85,000*l.* preference shares, which ranked as No. 1 preference stock, and 60 000*l.* ordinary shares, which ranked as No. 2 preference stock, and power was reserved to the Cambrian Company, to raise any capital which either of the amalgamated companies had power to raise prior to the amalgamation. The directors of the amalgamated company, under a bonâ fide belief that they were authorized to raise 15,000*l.* additional preference shares of the L. Company, and to make them rank with the 85,000*l.* No. 1 preference stock, issued 15,000*l.* shares of preference stock, and described them as No. 1 preference stock in the certificates, which were signed by the directors and the secretary, and which were handed to the plaintiff at the time he purchased some of the stock. It was subsequently decided that the new stock was not No. 1 preference stock, but ranked below it. *Held*, that the purchaser had not been deceived by any misrepresentation of fact, and his bill was dismissed.

THIS bill was filed in 1874, alleging that the plaintiff had been

[1] 4 Chan. Div. 693–718.